PUBLIC PROSECUTOR v. CHEW SIEW LUAN

[F.C. (Raja Azlan Shah C.J. (Malaya), Abdoolcader and Gunn Chit Tuan JJ.) April 12, 1982]
[Penang – Federal Court Criminal Reference No. 1 of 1982]

Criminal Law and Procedure – Bail – Offences under Dangerous Drugs Act, 1952 – Whether section 388 Criminal Procedure Code overrides provisions of section 41B of Dangerous Drugs Act – Dangerous Drugs Act, 1952, ss. 39B and 41B – Criminal Procedure Code (F.M.S. Cap. 6), s. 388.

Interpretation – Generalibus Specialia derogant.

In this case a woman who was pregnant was charged with trafficking in 157.08 grammes of heroin, an offence under the Dangerous Drugs Act, 1952, which carried a punishment of death or imprisonment for life. The learned President of the Sessions Court granted her bail pending the hearing of the case relying on the proviso to section 388(1) of the Criminal Procedure Code. An appeal by the Public Prosecutor against the order granting bail was dismissed by the learned Judge of the High Court who held that section 41(B) (1) and (2) of the Dangerous Drugs Act, 1952, does not override the proviso to section 388(1) of the Criminal Procedure Code – See [1982] 1 M.L.J. 280. He later referred the following questions to the Federal Court:

(i) Whether or not section 388 Criminal Procedure Code overrides the provisions of section 41B of the Dangerous Drugs Act 1952 (Act 234).

(ii) If the answer to question (i) above is in the negative, whether it is right in law for bail to be granted in respect of a person charged for an offence under section 39B of the Dangerous Drugs Act 1952 (Act 234).

Held: (1) the provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the specific provisions of section 41B of the Dangerous Drugs Act in that regard;

(2) the answer to the first question referred to the court must be in the negative and the second was accordingly a *non sequitur.*

Case referred to:–

(1) *Public Prosecutor* v. *Chu Beow Hin* [1982] 1 M.L.J. 135, 137.

FEDERAL COURT.

Shaikh Daud bin Haji Mohamed Ismail (Deputy Public Prosecutor) for the applicant.

K. Kumaraendran for the respondent.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the Judgment of the Court): In this case the following questions were referred to us under section 66 of the Courts of Judicature Act, 1964:

(i) Whether or not section 388 Criminal Procedure Code overrides the provisions of section 41B of the Dangerous Drugs Act 1952 (Act 234).

(ii) If the answer to question (i) above is in the negative, whether it is right in law for bail to be granted in respect of a person charged for an offence under section 39B of the Dangerous Drugs Act 1952 (Act 234).

We answered the first question in the negative and the second was accordingly a *non sequitur.*

On May 26, 1980, a woman *enceinte* with accouchement due in early July, 1980, was charged with trafficking in 157.08 grammes of heroin, an offence under section 39B (1) (a) and punishable under section 39B (2) of the Dangerous Drugs Act, 1952. The offence carries a punishment of death or imprisonment for life. On June 9, 1980 the learned President of the Sessions Court granted her bail pending the hearing of the case on an application of the proviso to section 388(i) of the Criminal Procedure Code which permits the granting of bail to any person under the age of 16 years or any woman or any sick or infirm person accused of a non-bailable offence carrying life imprisonment or death as a penalty.

On appeal by the Public Prosecutor against the order so made granting bail the learned judge dismissed it stating that section 41B (1) and (2) of the Dangerous Drugs Act does not override the proviso to section 388(i) of the Criminal Procedure Code. He seemed to think that section 41B of the Act should not be construed as having the effect of fettering the discretion to grant bail under the provisions of the Criminal Procedure Code in cases covered by the proviso to section 388(i) thereof. Section 41B (1) of the Dangerous Drugs Act provides:

"(1) Bail shall not be granted to an accused person charged with an offence under this Act –

(a) where the offence is punishable with death; or

(b) where the offence is punishable with imprisonment for more than five years; or

(c) where the offence is, punishable with imprisonment for five years or less and the Public Prosecutor certifies in writing that it is not in the public interest to grant bail to the accused person.

(2) The provisions of subsection (1) shall have effect notwithstanding any other written law or any rule of law to the contrary."

Now, the Criminal Procedure Code (F.M.S. Cap. 6) which came into force on 1.1.1927 is an enactment regulating criminal proceedings in general in the former Federated Malay States. It was amended and extended throughout Malaysia by the Criminal Procedure Code (Amendment and Extension) Act, 1976 on 10.1.1976. It cannot be gainsaid that it is a written law within the meaning assigned in section 2 of the Interpretation Act, 1967.

The Dangerous Drugs Act 1952 (Revised – 1980) is an Act specifically designed to regulate the importation, exportation, manufacture, sale and use of, *inter alia,* dangerous drugs, and "to make special provisions relating to the jurisdiction of courts in respect of offences thereunder and their trial, and for purposes connected therewith". In other words, the Act is in substance a special law passed by Parliament in derogation of the rights of a person concerning the granting of bail in an otherwise ordinary case. We further note in particular that section 41B of the Act is an entirely new section introduced by the Dangerous Drugs (Amendment) Act, 1978 (Act A426) and became operative on 10.3.78. *Generalibus specialia derogant* is a cardinal principle of interpretation. It means that where a special provision is made in a special statute, that special provision excludes the operation of a general provision in the general law. (See also *Public Prosecutor* v. *Chu Beow Hin*[1]). The provisions of section 3 of the Criminal Procedure Code which counsel for the respondent seeks to rely on has no relevance whatsoever to the matter in issue before us.

It would be erroneous to apply expressions used and provisions made in one statute to another and entirely different one in complete disregard of the latter's express stipulations in the light of its specific purpose and object.

On the other hand, it is a sound, and, indeed, a well-known principle of construction of a statute that the purport of words and expressions used in a legislative measure must take their colour from the context in which they appear. We do not therefore agree with the learned judge that it is open to a court to subject the express provisions regarding bail in section 41B of the Dangerous Drugs Act to the provisions relating thereto in the Criminal Procedure Code. The provisions regulating the granting of bail under the Dangerous Drugs Act must be construed in the context of that Act and not in that of the Criminal Procedure Code and to that extent the general provisions of the Criminal Procedure Code must *ex necessitate* yield to the specific provisions of section 41B of the Dangerous Drugs Act in that regard. We should perhaps also observe *en passant* that any other construction would result in nullifying the purport and effect of the provisions of section 41B (1) (c) of the Dangerous Drugs Act and render otiose and ineffective a certificate of the Public Prosecutor thereunder that it is not in the public interest to grant bail to a person accused of an offence under the Dangerous Drugs Act punishable with imprisonment for five years or less.

The answer to the first question must accordingly be clearly in the negative and we so decided at the conclusion of argument in this reference.

Order accordingly

Solicitors: *Kumar & Co.*

MARK KODING v. PUBLIC PROSECUTOR

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo), Abdul Hamid F.J., Hashim Yeop A. Sani J. & Abdoolcader J.) March 30 & April 17, 1982]
[Kuala Lumpur – Federal Court Criminal Reference No. 3 of 1982]

Constitutional Law – Right of free speech in Parliament – Whether limited by amendment to Constitution by Constitution (Amendment) Act, 1971 – Whether amendment valid – Basic structure of Constitution – Fundamental rule of natural justice – Questioning matter established or protected by provisions of Article 152 of Constitution – Sedition Act, 1948, s. 4(1)(f) – Houses of Parliament (Privileges and Powers) Ordinance, 1952, ss. 3, 8 & 33 – Federal Constitution, arts. 10, 63, 152 & 162.

Criminal Law and Procedure – Sedition – Reference of question to Federal Court – Effect of Constitution – Rules of the Federal Court, rr. 33, 34 & 35 – Courts of Judicature Act, 1964, ss. 48 & 49.

Interpretation – Interpretation of written Constitution – Maxim generalia specialibus non derogant – Whether applicable.

In this case the accused a Member of the House of Representatives made a speech in Parliament which was thought to be seditious and he was charged with committing an offence contrary to section 4(1)(b) of the Sedition Act. At the end of the prosecution case, the learned trial judge called on the accused to enter on his defence. Counsel for the accused announced that the defence did not wish to call any witness. The learned trial judge then referred three questions to the Federal Court as follows:

"(1) As a Member of Parliament, has the Accused's right of free speech in Parliament given (a) by sections 3 and 8 of the Houses of Parliament (Privileges and Powers) Ordinance [No. 15 of] 1952 and (b) by Article 63(2) of the 1957 Federal Constitution been validly limited by the subsequent constitutional amendment with the addition of Clause (4) to Article 63 by Act A30?

(2) As a Member of Parliament, is the Accused's right of free speech in Parliament given by Article 63(2) of the Constitution either (a) part of the basic structure of the Constitution or (b) a fundamental rule of natural justice, so that any purported amendment of the Constitution seeking to limit such right is void and of no effect?

(3) Having regard to the position of Malay language as the national language under Article 152 Clause (1) of the Federal Constitution and questioning it would bring into operation section 3(1)(f) of the Sedition Act 1948 (Revised 1969) – can the demand for closure of Chinese and Tamil schools in the process of implementing the national language be legally and constitutionally treated as questioning the provision of proviso (a) of Article 152(1), notwithstanding that there is no demand for the abolition or prohibition of the teaching or learning of such languages?"

Held: (1) the accused's right of free speech in Parliament given by sections 3 and 8 of the Houses of Parliament (Privileges and Powers) Ordinance, 1952, and by Article 63(2) of the Federal Constitution, has been validly limited by the amendment effected by the new Clause (4) of Article 63 added by the Constitution (Amendment) Act, 1971;

(2) it is unnecessary to decide whether or not the Constitution may be so amended as to destroy its basic structure and, in any event, the accused's right of free speech in Parliament given by Article 63(2) of the Constitution does not form part of the basic structure of the Constitution;

(3) the said right is not part of the fundamental rule of natural justice;

(4) thus the amendments made by the Constitution (Amendment) Act, 1971 limiting an M.P.'s right of free speech in Parliament are valid;

(5) the answer to the third question is bound up with the facts of the case which were uncertain and as to which there were no findings by the learned trial judge, and it would be premature and speculative to answer this question at this stage;

(6) the matter should be remitted to the learned trial judge for continuation and disposal in accordance with this judgment.

[Semble: It would have been better if the learned Judge had not referred the matter to the Federal Court but instead had himself decided the constitutional questions which arose (which he had jurisdiction to do) and decided the case one way or the other]

Cases referred to:

(1) *Endell Thomas* v. *Attorney-General of Trinidad and Tobago* [1981] 3 W.L.R. 601.

(2) *Fernandez* v. *Attorney-General* [1970] 1 M.L.J. 262, 264.

[The following authorities were also cited in argument: *Loh Kooi Choon* v. *Government of Malaysia* [1977] 2 M.L.J. 187; *Ong Ah Chuan* v. *Public Prosecutor* [1981] 1 M.L.J. 64; *Haw Tua Tau* v. *Public Prosecutor* [1981] 2 M.L.J. 49; [1981] 3 W.L.R. 395, 399-400; *Phang Chin Hock* v. *Public Prosecutor* [1980] 1 M.L.J. 70; *Teh Cheng Poh* v. *Public Prosecutor* [1979] 1 M.L.J. 50; *Yeap Hock Seng* v. *Minister for Home Affairs, Malaysia & Ors.* [1975] 2 M.L.J. 279]

FEDERAL COURT.

Mervyn Heald Q.C. (*Marina Yusof* and *Wong Chee Min* with him) for the applicant.

Lamin bin Haji Mohamed Yunus, (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Suffian L.P. (delivering the judgment of the Court): The accused, a lawyer, was a member of the Dewan Rakyat, i.e., the House of Representatives, elected for a constituency in Sabah; and on October 11, 1978, he made in the House a speech which the Public Prosecutor thought was seditious, and accordingly he was charged with committing